STATE OF MICHIGAN

IN THE SUPREME COURT

IVAN FRANK, JEFFREY DWOSKIN, PHILLIP D. JACOKES, ROY KRAUTHAMMER, BLAKE ATLER, MATT KOVALESKI, JAMES BRUNK, and **IJF HOLDINGS, LLC**,

Plaintiffs/Appellees,

v.

DANIEL GILBERT, JOSHUA LINKNER, BRIAN HERMELIN, GARY SHIFFMAN, DAVID KATZMAN, ARTHUR WEISS, JAY FARNER, CAMELOT-ePRIZE, LLC, BH ACQUISITIONS, LLC, CRACKERJACK, LLC f/k/a ePRIZE, LLC, and **CRACKERJACK HOLDINGS, LLC**, f/k/a ePRIZE HOLDINGS, LLC,

Defendants/Appellants.

MSC No. 151888
COA No. 318751
L/C No. 13-133554
Hon. Colleen O'Brien

REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL OR ORDER GRANTING PEREMPTORY RELIEF

Brian G. Shannon (P23054)
R. Christopher Cataldo (P39353)
JAFFE, RAITT, HEUER & WEISS, P.C.
Attorneys for Appellants other than Daniel Gilbert and Jay Farner
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
bshannon@jaffelaw.com

Gerard Mantese (P34424)
Mantese Honigman PC
Attorney for Plaintiffs
1361 E. Big Beaver Rd.
Troy, MI 48083-1956
(248) 457-9200

Jeffrey B. Morganroth (P41670)
MORGANROTH & MORGANROTH, PLLC
Attorney for Gilbert and Farner
344 N. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

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REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL OR FOR PEREMPTORY REVERSAL

ARGUMENT

Much of Plaintiffs' Response in Opposition to Defendants' Application for Leave to Appeal ("Response") presents alleged facts and legal issues that are irrelevant to this Court's resolution of the questions raised by ePrize. ePrize seeks plenary review of or a quick decision on two narrow issues: did the Court of Appeals err in holding that Plaintiffs' minority oppression claim did not accrue in 2009; and, if not, did the panel err in not deeming itself bound by the "repose" holding in *Baks*.

Plaintiffs, however, spend pages challenging whether Frank received, reviewed, and signed the Fifth Operating Agreement (although the Court of Appeals assumed these things and Plaintiffs failed to cross-appeal); claiming they had an oral contract with a longer statute of limitation (contrary to the Court of Appeals and, again, no cross appeal); questioning whether a 2005 conversion of ePrize membership units to ePrize Holdings units actually occurred (clearly time-barred issue in this 2013 lawsuit), and arguing fraudulent concealment and other legal issues that have not yet been addressed by any court and present no issue for review now.

These issues have no bearing on the questions presented by ePrize. They are digressions at best, intended to mask Plaintiffs' inability to explain why their member oppression claims did not accrue in 2009. When they *do* write about the real issues, Plaintiffs are incorrect for the reasons discussed below.

A. The only question this Court need address is when MCL 450.4515 claims accrue

In *Madugula v Taub*, 496 Mich 685, 702; 853 NW2d 75 (2014), this Court held that the damage remedy in the Business Corporation Act's oppression statute was one among the "enumerated nonexhaustive list of various forms of *equitable relief*" available under MCL

450.1489 (emphasis added). MCL 450.1489 is nearly identical to MCL 450.4515, its analog in the LLC Act. The parties and Court of Appeals all agree that the BCA and LLCA are to be interpreted consistently as to the time limitations for bringing claims (Application Tab A at 9 n6, citing *Duray Dev, LLC v Perrin*, 288 Mich App 143, 159; 792 NW2d 749 (2010)). The Court of Appeals held that all of Plaintiffs' appealed claims, including fiduciary duty and breach of contract, are subject to the time periods in MCL 450.4515 (Tab A at 6-7). The accrual analysis is no different because Plaintiffs seek damages rather than another equitable remedy provided by the oppression statute. If any of Plaintiffs' oppression claims accrued in 2009—and they did—all of the oppression claims accrued in 2009.

B. Plaintiffs are bound by the Court of Appeals' holding that MCL §450.4515 governs all their claims

The Court of Appeals held that all of Plaintiffs' claims, including their alleged breach of contract and breach of fiduciary duty claims, mirror their member-oppression claims and therefore are subject to the time periods in MCL 450.4515 (Tab A at 6-7). ePrize agrees and did not raise any such issue in this Court. More importantly, Plaintiffs did not cross-appeal the issue. Consequently, Plaintiffs are now bound by the Court of Appeals' decision and their failure to cross-appeal precludes review of the issue in this Court. *McCardel v Smolen*, 404 Mich 89, 95 n6; 327 NW2d 3 (1978) ("A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him," quoting *LeTulle v Scofield*, 308 US 415, 421-22; 60 S Ct 313 (1940)).

C. A single "significant action" can trigger accrual under MCL 450.4515

Plaintiffs have cherry-picked the language they think helps them in MCL 450.4515 (Tab C) by emphasizing only the phrases "continuing" and "series of actions" when they quote the statute (Response at 15). They then write their argument as though the statute did not actually define oppressive conduct as "a continuing course of conduct *or a significant action* or series of actions that substantially interferes with" a member's interests (Tab C; emphasis added). This is telling. The adoption of the Fifth Operating Agreement and its payment waterfall in 2009 was by any measure *the* "significant action" that oppressed Plaintiffs, if any oppression there was.

The Court of Appeals addressed this very issue in *Schimke v Liquid Dustlayer, Inc*, No. 282421, 2009 WL 3049723 (COA 2009) (Tab I) with respect to the BCA oppression statute, MCL 450.1489. The definition of "willfully unfair and oppressive conduct" as used in §489 is nearly identical to that of MCL 450.4515: "'willfully unfair and oppressive conduct' means a continuing course of conduct *or a significant action* or series of actions that substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489(3) (emphasis added).

The *Schimke* plaintiff, a minority shareholder of Liquid Dustlayer, brought a §489 claim against Rademaker, the sole director of Liquid Dustlayer. Schimke claimed that Rademaker's proposed plan to have Liquid Dustlayer redeem his own stock on terms that were not made available to Schimke was oppressive and constituted willfully unfair and oppressive conduct. In response, defendants asserted the argument made here by Plaintiffs: "that plaintiff failed to establish a violation of §489 because he failed to show a *pattern* 'of willfully unfair and oppressive conduct'" (Tab I, *Schimke* at *2). Relying on the oppression definition in the statute, the Court of Appeals rejected defendants' argument:

> However, §489(3) defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder" (emphasis added). Thus, "willfully unfair and oppressive conduct" *may be established by proof of* either (1) a continuing course of conduct, (2) *a significant action*, or (3) a series of actions. *Accordingly, a single significant action that substantially interferes with a shareholder's interests as a shareholder is sufficient to support a cause of action under §489. Id.* (emphasis added).

The Court found that defendants' proposed stock redemption plan was a significant action sufficient to sustain a §489 claim.

Just as in *Schimke*, this is a 'significant action' case, not a 'continuing course of conduct' case. The 2009 approval and adoption of the Fifth Amended and Restated Operating Agreement (the Agreement is Response Ex 5) was a significant action, which Plaintiffs themselves deem "oppressive" (Response at 16). By its terms, the new operating agreement recapitalized ePrize, created new membership units with priority over all other ePrize units, and created a payment priority "waterfall" in the event of a liquidation or other distribution that guaranteed no Plaintiff would receive a penny until more than $100 million had been disbursed to senior equity ($68.25 million to the new Series C units and about $53 million to the four Series B units). Plaintiffs claim they were promised "no dilution," but in 2009 the value of any units they might have held—other than the Series C units Frank himself purchased—was diluted by $68.25 million. (The Series B units began as loans in 2007 and so were already entitled to priority.) If there was oppression, it happened with this "significant action" in 2009. The actual distribution in 2012 was ministerial. This is not a "continuing course of conduct" case because the 2012 distribution could not have been made in any other way.

D. Plaintiffs were "harmed," if at all, in 2009

Plaintiffs correctly say that a "claim accrues at the time the wrong upon which the claim is based was done." In quoting MCL 600.5827, however, Plaintiffs again conveniently overlook

critical language. The statute actually states that a "claim accrues at the time the wrong upon which the claim is based was done *regardless of the time when damage results*." MCL 600.5827 (emphasis added).

Michigan courts have interpreted the "time of the wrong" language to mean "the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty." *Moll v Abbott Lab*, 444 Mich 1; 506 NW2d 816 (1993). Importantly, the question of whether a wrong has occurred or, in other words, a plaintiff has suffered harm, is not dependent on the "finality of monetary damages." *Luick v Rademacher*, 129 Mich App 803, 806; 342 NW2d 617 (1983) cited by *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). Rather, a plaintiff must show only "the occurrence of identifiable and appreciable loss." *Gebhardt*, 444 Mich at 545. The language of MCL 600.5827 and case law applying it are fatal to Plaintiffs' argument that their claims did not accrue in 2009.

Plaintiffs try to use the *Moll* distinction between the defendant's breach and the harm to plaintiff to imply that a plaintiff's harm and a defendant's wrong *cannot* occur at the same time, but that they must be separate and distinct events. Of course, that is not the holding of *Moll* or of any other Michigan case. The harm and the wrong can and often do occur together, particularly when the wrong is intentional and not a negligent act. In their argument summary, Plaintiffs claim that "[b]efore 2012, Plaintiffs' membership units had value" (Response at 9), but this is where they are wrong. Other than Frank's Series C units, junior units had no value or only a greatly diluted value after March 2009. Even if ePrize had been sold for twice what it was eventually sold for, Plaintiffs were never going to share in the first $100+ million distributed.

Plaintiffs also err in claiming that *Connelly v Paul Ruddy's Equipment*, 388 Mich 146; 200 NW2d 70 (1972), supports their position that they did not suffer harm until 2012. *Connelly*

is a negligence case. The plaintiff there brought claims for injuries resulting from an industrial accident caused by defendant's negligence. The alleged negligent acts—the preparation, design, repair, and delivery of a press—occurred years before Connelly's injury. This Court held that Connelly's claim did not accrue until she was injured because she was unable to establish the element of harm before that time: "Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run." *Connelly*, 388 Mich at 151.

Although the *Connelly* plaintiff was not harmed until she was injured, Plaintiffs here were harmed, if at all, when ePrize created new senior units and a payment priority waterfall that spelled out what was to occur in the event of a distribution. Connelly was harmed when she was injured, and Plaintiffs were harmed when *they* were injured, which in their more candid moments they admit is when the units they claimed to own were diluted. There is nothing "speculative" (to use Plaintiffs' favorite word) about the events of 2009. This is when Plaintiffs' claims accrued. Connelly had no personal injury claim just because there was a faulty press in her workplace, but Plaintiffs had their oppression claim, for whatever it was worth, in 2009.

In this regard, the Sixth Circuit Court of Appeals' decision in *Techner v Greenberg*, 553 Fed Appx 495 (2014) (applying Michigan law) (Tab H) is far more illuminating than *Connelly*. Applying MCL 450.4515, the court found that plaintiff's oppression claim accrued in 2003 when wrongful distributions occurred, ten years before commencement of her suit. The difference between *Techner* and the present case is that no harmful act *preceded* the distributions. In *Techner*, "the harm suffered by [plaintiff] (the failure to receive proper distributions…) occurred at the same time that the defendant's wrong (the failure to ensure proper distributions) was perpetrated." *Id.* at 506.

Also more illuminating (and not addressed by Plaintiffs) is *Schnelling ex rel Bankruptcy Estate of Epic Resorts, LLC v Prudential Securities, Inc*, 2004 WL 1790175 (ED PA 2004) (Tab F). *Schnelling* was decided on similar facts and accrual principles. The court concluded that the harm to counter-plaintiff resulting from the sale of receivables did not occur when the receivables were sold and counter-plaintiff was able to calculate damages exactly, but when the value of the receivables was diminished by defendant's failure to create escrow accounts in years prior. Tab F at *2. Much like here, an event occurred before the sale (or for our purposes, distribution) that allegedly caused harm to counter-plaintiff and fixed his rights.

Plaintiffs acknowledge that ePrize's allegedly "oppressive intent" was evident in 2009 (Response at 16) and that they could have sought equitable relief in 2009 (Response at 10). Their only rationale for why they did not suffer harm in 2009 appears to be a statement made in an affidavit by their expert that "the dollar amount and proportion [of proceeds] (both which ultimately were zero at the 2012 transaction date) could only be determined in 2012, the date on which the triggering event (e.g., liquidation) and proceeds are actually received by the Company" (Response Ex 2). This, of course, boils down to an assertion that their action did not accrue until they could measure their damages exactly, which is not the law in Michigan or anywhere else. As ePrize has previously explained, Michigan courts have been clear that the test for accrual is not when a plaintiff can establish a "finality of monetary damages," but when an identifiable and appreciable loss occurs. *Luick*, *supra*; *Gebhardt*, *supra*.

E. Fraudulent concealment is not before this Court

The circuit court correctly deemed itself bound by *Baks* to hold that MCL 450.4515 was a statute of repose (Pltfs COA Ex 2). Because of that, it had no occasion to rule on fraudulent concealment, which is not a relevant consideration with statutes of repose. The Court of Appeals incorrectly held that Plaintiffs cause of action did not accrue until 2012, a year before suit was

filed, so it too had no occasion to consider fraudulent concealment, albeit for a different reason. There is, in short, no decision for this Court to review on that subject. Plaintiffs have devoted significant ink to the issue, perhaps because they recognize that their action accrued in 2009, but assuming MCL 450.4515 is a statute of limitation and not repose, there remain disputed issues of material fact on fraudulent concealment that need to be resolved before a ruling can be made, much less reviewed.

ePrize doubts that Plaintiffs can establish fraudulent concealment. On April 3, 2009, Frank acknowledged in writing that he was given the Fifth Operating Agreement and carefully reviewed it (ePrize COA Tab E). He received a document showing the distribution waterfall (ePrize COA Tab D, Frank Subscription Agreements, at A-1, A-2) and cannot establish concealment. Most of the Plaintiffs had no units of ePrize and therefore no standing to assert an oppression claim—another issue that has not yet been addressed—which would moot any consideration of fraudulent concealment as to them. Moreover, Plaintiffs completely disregard Michigan law and the well-established rule that a plaintiff cannot rely on fraudulent concealment to toll a statute of limitations without exercising reasonable diligence to discover that a claim exists. *See Barry v Detroit Terminal R Co*, 307 Mich 226; 11 NW2d 867 (1943); *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 643; 692 NW2d 398 (2004). No review of fraudulent concealment can be undertaken until after this Court makes a decision on the accrual issue and then, if fraudulent concealment remains relevant, it has been adjudicated on remand by the circuit court.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in its application and for the additional reasons stated here, ePrize asks this Court to grant peremptory relief under MCR 7.302(H)(1) and reinstate the dismissal of

Plaintiffs' claims by the trial court (ePrize COA Tab E), for the reason that Plaintiffs claims accrued in 2009.

In the alternative, Defendants asks this Court to grant leave to appeal from the April 7, 2015 decision of the court of appeals (Tab A) to consider the important questions of Michigan accrual law and the precedential value of *Baks v Moroun*, 227 Mich App 472, 486 (1998), *ovrrld in pt on other grds by Estes v Idea Engineering*, 250 Mich App 270 (2002), presented but inadequately addressed by the Court of Appeals.

Respectfully Submitted,

/s/ Brian G. Shannon
Brian G. Shannon (P23054)
R. Christopher Cataldo (P39353)
JAFFE, RAITT, HEUER & WEISS, P.C.
Attorneys for Appellants other than
Daniel Gilbert and Jay Farner
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
bshannon@jaffelaw.com

Jeffrey B. Morganroth (P41670)
MORGANROTH & MORGANROTH, PLLC
Attorney for Gilbert and Farner
344 N. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

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